No. 01-1150

In The

Supreme Court of the United States

LEON C. BAKER P.C. and LEON C. BAKER, individually,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER UNDER THE FACTS OF THIS CASE, THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 2 ("FAA") PERMITS A COURT, RATHER THAN ARBITRATORS, TO RULE ON ISSUES OF PRECLUSION (RES JUDICATA AND COLLATERAL ESTOPPEL)?

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JURISDICTION

The opinion of the Alabama Supreme Court was entered on August 31, 2001. An application for rehearing was filed on September 13, 2001 and was denied on November 16, 2001. This Petition for a Writ of Certiorari was filed within ninety days of the denial. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, Section 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, shall be valid, irrevocable, and enforceable * * * .

STATEMENT OF THE CASE

Leon Baker is no newcomer to this Court. In the years during which this protracted dispute has been dragged out by Mr. Baker, he has filed no less than four unsuccessful petitions for a writ of certiorari. Likewise, this one should be denied as well.

I. Procedural History

On April 3, 2000, Merrill Lynch filed a Verified Complaint for Injunctive Relief and a Motion for Temporary Restraining Order with the Circuit Court for Jefferson County, Alabama. The Verified Complaint named as defendants Leon C. Baker, P.C. ("the P.C.") and Leon C. Baker individually ("Baker") (collectively, "Petitioners"). It asked that Defendants be barred from circumventing prior rulings that the Circuit Court of Jefferson County had made in a case styled *J. R. Bennett et al. v. Leon C. Baker et al.*, CV 94-5629. In particular, the Verified Complaint requested a permanent injunction barring the P.C. from prosecuting *Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, NASD Case No. 99-03764, an arbitration case that the P.C. had filed with the National Association of Securities Dealers, Inc. ("NASD") in August 1999.

The circuit court granted the aforementioned Motion and entered the requested Temporary Restraining Order. After the May 15, 2000 hearing, the trial court entered a May 23, 2000 Order granting Merrill Lynch's request for permanent injunctive relief. It later denied Defendant's new trial motion.

Baker filed an appeal with the Alabama Supreme Court. After due consideration, the Alabama Supreme Court affirmed the lower court's decision. It later denied Defendant's Motion for Rehearing.

II. Statement of Facts[1]

Unfortunately, Baker's recitation of the facts to this Court presents an inaccurate picture. Once the facts are accurately described, the petition for further review disappears rapidly.

The Madison County Litigation

The relevant events in this case date back to 1980. In that year, two Huntsville residents, J. R. Bennett and his wife, Laura, invested in a tax shelter that Baker, a tax attorney, had recommended and apparently designed. The tax shelter required the Bennetts to buy computers from a leasing company; however, unbeknownst to the Bennetts, Baker owned the leasing company. Moreover, the Internal Revenue Service eventually declared Baker's tax shelter to be "abusive" and denied the Bennetts their tax deduction.

After learning of Baker's undisclosed role in the leasing company and after settling their tax liability with the IRS, the Bennetts – who had paid Baker's leasing company $1,315,938 – sued Baker in the Circuit Court of Madison County, Alabama. They accused Baker of "knowingly creat[ing] a sham tax shelter[,]" "conspir[ing] to involve the Bennetts in the scheme[,]" and "intentionally misleading them as to the facts underlying the [shelter]." *Baker v. Bennett*, 603 So.2d 928, 934 (Ala. 1992).

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[1] This Statement of Facts is drawn from the Verified Complaint which was introduced into evidence at the May 15, 2000 hearing.

A jury rendered a $440,025 verdict against Baker and a judgment in that amount was duly entered.

Baker appealed the Madison County judgment to the Alabama Supreme Court, where it was affirmed unanimously. *See Baker*, 603 So.2d at 928. But Baker was not content to stop there. He filed a motion for reconsideration with The Alabama Supreme Court. It was denied. And he filed a petition for writ of certiorari with this Court. It too was denied.

When the Madison County judgment was entered against Baker, he did much more than exhaust his appellate rights. Specifically, Baker filed two Florida lawsuits in 1992 asking Florida state courts to undo the Madison County judgment or prevent collection thereon. (A third such lawsuit, filed by Baker's wife against the Bennetts and Merrill Lynch, was also filed in Florida state court in 1992.)

Baker's first Florida suit named the Bennetts as defendants and argued that the Alabama judgment was void. It was dismissed on summary judgment and affirmed on appeal. *See Baker v. Bennett*, 633 So.2d 91 (Fla. Dist. Ct. App. 1994). Baker moved the Florida appellate court to rehear the appeal (the motion was denied) and filed a petition in this Court as well (also denied).

In his second Florida case, Baker sued the Bennetts' attorneys, James L. North, J. Timothy Francis, and John W. Haley, and their respective law firms, including the Hare, Wynn, Newell & Newton firm. This complaint alleged malicious prosecution, slander, and abuse of process based on the Bennetts' Madison County case – *notwithstanding the fact that the Bennetts' attorneys had won*

that case. Baker lost this Florida case in the trial court, lost on appeal, and lost in this Court once again when his petition for writ of certiorari was denied. As part of this litigation, a Florida appeals court sanctioned Baker for taxing judicial resources with his frivolous filings.

Baker is a wealthy man: it is a matter of public record that, as of 1999, he had assets of over $40,000,000. As such, it would not have been unduly difficult for him to pay the $440,025 Madison County judgment. Despite his wealth, however, and despite his exhaustion of all appellate remedies – including, as noted, a petition for certiorari denied by this Court – Baker adamantly refused to satisfy the Madison County judgment.

The Jefferson County Litigation (CV 94-5629)

Baker's refusal to pay the Madison County judgment forced the Bennetts to take action. In August 1994, after unsuccessfully attempting to garnish Baker's securities, the Bennetts filed suit in the Circuit Court of Jefferson County, Alabama to enforce their judgment through equitable means, pursuant to Ala. Code § 6-6-180 and § 6-6-185 (1975). The Bennetts' Jefferson County lawsuit, as noted *supra*, was styled *J. R. Bennett et al. v. Leon C. Baker et al.*, CV 94-5629 ("CV 94-5629"). The complaint named as defendants Baker, Merrill Lynch, and two other brokerage firms. The case was assigned to the Honorable Roger M. Monroe.

The Circuit Court of Jefferson County decided CV 94-5629 in the Bennetts' favor and against Baker. It ordered Merrill Lynch to transfer funds from a specific Merrill Lynch account – account number 754-96534

("Account 754-96534") – to the Bennetts' attorneys in satisfaction of the Madison County judgment. In October 1994, Merrill Lynch complied with the court's order and transferred $724,353.33 to the Bennetts' attorneys from Account 754-96534. The $724,353.33 represented the underlying $440,025 judgment, interest on the judgment, and almost $90,000 in civil contempt fines levied against Baker for his refusal to comply with the Court's orders.

In the course of ruling for the Bennetts, the Circuit Court of Jefferson County made two findings in CV 94-5629 that are of critical importance. It is these two findings that afforded the primary basis for the equitable relief that Merrill Lynch sought below.

First, in CV 94-5629, the Circuit Court of Jefferson County held that Account 754-96534 – the account from which the $724,353.33 was transferred – belonged to Baker individually, not to the P.C., and could therefore be used to satisfy the Bennetts' judgment.

The court made this finding *at least four different times*, in four different orders: (1) in an October 14, 1994 Order, p. 6 (Account 754-96534 was Baker's *"personal* brokerage account") (emphasis added); (2) in an October 18, 1994 Order, p. 1 (same); (3) in an October 21, 1994 Order, p. 2 (same); and (4) in an October 25, 1994 Order.

The court's October 25, 1994 Order is particularly relevant to the Alabama courts' decisions below. In pertinent part, it reads as follows:

> *The Court specifically finds as a matter of fact that Baker's Merrill Lynch Account #754-96534 13-3060422 is a personal account of Baker's.* Baker has asserted, in a letter to this Court and in an

> affidavit, that such account is a "P.C." account. Baker contends that the securities made subject to this Court's orders . . . are actually owned by Leon C. Baker, P.C., a New York corporation, and not by Baker individually. However, there is absolutely no evidence in the record in this case that the account in question is anything other than a personal account.

October 25, 1994 Order, pp. 4-5 (emphasis added). Instead the Court found that:

> The only competent and admissible evidence before this Court is the brokerage statement from such securities account which shows unequivocally that the account is titled in the name of Leon C. Baker, not Leon C. Baker, P.C. Such brokerage statement was produced by defendant Merrill Lynch and was offered into evidence by the plaintiffs and admitted without objection by any defendant. Moreover, the address on such account is Baker's residence address in Boca Raton, Florida, not New York. In its Order of October 14, 1994, this Court specifically found that Baker's Merrill Lynch Account #754-96534 13-3060422 was a personal account of Baker's.

Id.

In order to be as clear and to the point as humanly possible, the trial judge continued with the following stark findings.

> *Baker has now had three full and fair opportunities to present any competent and admissible evidence to contradict his personal ownership of such account, but he has failed to do so. Accordingly, this Court's factual finding that Merrill Lynch Account*

#754-96534 13-3060422 is a personal account of Baker's is specifically reaffirmed.

Id. (emphasis added).

The second crucial finding by the Circuit Court of Jefferson County in CV 94-5629 was a finding holding Merrill Lynch harmless for the transfer of the $724,353.33.

The court made this finding on two separate occasions: (1) in an October 27, 1994 Order ("Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities as directed by this Court."); and (2) in a November 14, 1994 Order, p. 2 ("Merrill Lynch is hereby directed to wire transfer $724,353.33 . . . to counsel for the Bennetts. *The Court specifically finds and holds that Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's compliance with the Orders of this Court.*") (emphasis added).

Baker appealed the Circuit Court of Jefferson County's order to the Alabama Supreme Court; actually, he filed at least *six different notices of appeal* to the Alabama Supreme Court. The Alabama Supreme Court, however, affirmed the circuit court's order in its entirety, without opinion. Baker later filed a motion for rehearing; the Alabama Supreme Court denied it. He then filed another petition for writ of certiorari with this Court; it was likewise denied.

Other Litigation

When the Circuit Court of Jefferson County entered its orders in CV 94-5629 enforcing the Madison County

judgment, Baker and the P.C. did not simply rely on their appellate rights. Rather, *during the pendency of CV 94-5629*, the P.C. filed a lawsuit in Florida state court styled *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318. It named the Bennetts and Merrill Lynch as defendants and alleged abuse of process and due process violations based on the transfer of assets that the Circuit Court of Jefferson County had ordered.

In November 1994, Merrill Lynch moved to compel arbitration of the P.C.'s claims against it in *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318; in December 1994, the Florida Circuit Court granted that motion. However, the Florida court's December 1994 order compelling arbitration was superceded by a June 12, 1995 Order from that court dismissing the *entire* case with prejudice. *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318, slip op. at p. 2. The Florida court's order of dismissal made it clear that the P.C. could not turn to other fora to undo the Jefferson County Circuit Court's orders:

> The court finds that the claims of the plaintiff in this case, Leon C. Baker, P.C., are merely an attempt to relitigate the claims made by Leon C. Baker individually, in the case number CV-94-5629, *J. R. Bennett and Laura Jean Bennett v. Leon C. Baker, et al.*, Circuit Court in and for Jefferson County, Alabama, as affirmed by the Supreme Court of Alabama, case numbers 1940172, 1940207, 1940314, and 1940643. The court further finds that Plaintiff's complaint, taken as true, asks this court to grant relief for the actions of Alabama courts and would effectively circumvent the orders of the Alabama

> courts on the same issues. Any challenge to the Alabama judgment and garnishment proceedings should be brought in Alabama.

Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., CV 94-8318, slip op. at p. 2.

Baker and his P.C. were undaunted by the foregoing Florida court's dismissal order. On September 11, 1995, the P.C. sued the Bennetts' lawyers in the United States District Court for the Southern District of New York. In this lawsuit, the P.C. raised the same abuse of process and due process allegations that the Florida state court had earlier dismissed with prejudice. Upon motion by the defendants, the case was transferred to the United States District Court for the Northern District of Alabama.

The district court eventually dismissed the P.C.'s complaint. It held – like the Florida state court in *Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CV 94-8318 – that the P.C. was barred by the Jefferson County Circuit Court's prior decisions in CV 94-5629, as affirmed by the Alabama Supreme Court. However, the district court did not dismiss cross-claims and counterclaims that the Bennetts' attorneys had filed against Baker and his P.C., respectively. Those claims were allowed to proceed to trial, where they were settled at the close of the evidence for $250,000. Also, and more importantly, as part of the settlement Baker and his P.C. agreed to a permanent injunction forever barring them from suing the Bennetts or their attorneys.

Pursuant to the settlement and injunction agreement in the case before the district court in Alabama, Baker and his P.C. dismissed with prejudice *yet another lawsuit* that

they had filed against the Bennetts' attorneys. This suit was filed in New York state court *after* Judge Clemon had dismissed the P.C.'s claims against the attorneys.

Baker's litigation efforts have drawn their fair share of condemnation. In CV 94-5629, Judge Monroe fined Baker almost $90,000 for wilfully disobeying his orders. A Florida appellate court also sanctioned Baker for his baseless filings in one of his six *Bennett* cases. And in an unrelated case, *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246 (2nd Cir. 1995), a "tortuous" piece of litigation that Baker dragged out for more than a decade, *id.* at 253, the United States Court of Appeals for the Second Circuit condemned Baker's "delaying tactics" and his *"protracted history of . . . efforts to sidestep adverse rulings. . . . " Id.* (emphasis added).

The Arbitration

Against this backdrop, in August 1999 Baker's P.C. filed an arbitration claim (the "Arbitration") with the NASD, asking that Merrill Lynch be held liable for the $724,353.33 that was transferred to the Bennetts' attorneys pursuant to Judge Monroe's order, as well as for $500,000 in legal expenses. Through this arbitration proceeding, the P.C. was again plainly attempting to circumvent the prior rulings of the Circuit Court of Jefferson County in CV 94-5629. In particular, the P.C. was asking the arbitration panel to disregard the two critical findings by Judge Monroe noted *supra*.

First, the P.C. was asking the arbitrators to conclude that Account 754-96534 was a P.C. account, not a personal account. The P.C. made this argument even though the

Circuit Court of Jefferson County had ruled that the account was a personal account, and its judgment was affirmed by the Alabama Supreme Court on appeal. *See, e.g.*, October 25, 1994 Order, pp. 4-5 ("The Court specifically finds as a matter of fact that Baker's Merrill Lynch Account #754-96534 13-3060422 is a personal account of Baker's.").

Second, Baker's P.C. was asking the arbitrators to find that the transfer to the Bennetts' attorneys was illegal and that Merrill Lynch is liable therefor. *The P.C. made this argument notwithstanding the Circuit Court of Jefferson County's express holding (later affirmed by the Alabama Supreme Court) that Merrill Lynch was not liable to Baker or his P.C. for the transfer. See* October 27, 1994 Order ("Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's transfer and liquidation of securities as directed by this Court."); November 14, 1994 Order, p. 2 ("The Court specifically finds and holds that Merrill Lynch is not liable to Leon C. Baker or Leon C. Baker, P.C. as a result of Merrill Lynch's compliance with the Orders of this Court.").

In order to prevent judicial subterfuge, and in an attempt to stop Defendants' ten-year campaign to avoid responsibility for the Madison County judgment, Merrill Lynch filed this suit and asked that the Arbitration be enjoined. The requested relief was the only way the specific findings of the Jefferson County Circuit Court – and its jurisdiction – could be properly enforced. Anything less would have made a mockery of the Alabama state court's authority.

ARGUMENT

I. UNDER THE FACTS OF THIS CASE, THERE IS NO DISPUTE AMONG COURTS

It is easy to distinguish three of the four cases that Defendants cite for their position that there is a split in authority. Simply put, these cases do not apply to the case at bar and are only used to cloud the question for this Honorable Court. *National Union Fire Ins.*, 88 F.3d at 135, *Chiron Corp.v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000), and *Consolidated Coal Co. v. United Mine Workers*, 213 F.3d 404 (7th Cir. 2000) involve the prior preclusive effect of an *arbitration* award. If the preclusive order in question was entered by arbitrators, the argument in favor of allowing an arbitrator to decide the preclusive effect of the prior order is much stronger. Likewise, an arbitration agreement cannot strip a court of its inherent authority to enforce its prior judgment. These cases simply do not contemplate the question that Baker has put before this Court.

The fourth and final case that Defendants cite – *United States Fire Ins. Co. v. National Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996) – is also distinguishable, albeit on other grounds. In that case, the Second Circuit indeed held that arbitrators had to decide the preclusive effect of a prior court judgment. It so held, however, *only* because the district court could not resolve the collateral estoppel question independently. That is, in order to resolve the collateral estoppel dispute, the district court had to interpret a written agreement that was itself to be interpreted by arbitration. *United States Fire Ins. Co.*, 101 F.3d at 816 ("We hold that the dispute in this case is within the

agreement to arbitrate, *because* in order to reach its conclusion that the issues concerning costs of defense were identical, the district court found it necessary to interpret the . . . [a]greement.") (emphasis added). Here, of course, the circuit court did *not* have to interpret a written agreement in order to decide that Defendants were collaterally estopped. The two scenarios are completely different.

Furthermore, the party seeking arbitration in *United States Fire Ins. Co.* had not engaged in a protracted campaign to evade the allegedly-preclusive judgment. That is an important and distinguishing factor, specific to this case.

II. PETITIONERS HAVE NOT PROPERLY PRESERVED THE ARGUMENT THEY PRESENT HERE

At the trial court level, Baker failed to argue that the trial court could not decide the collateral estoppel question – instead, Petitioners affirmatively asked the Alabama State Court to decide the collateral estoppel question in their favor, arguing that the P.C. was neither a party nor privy to CV 94-5629.

For that matter, only *one* of the cases Petitioners cite in their Petition was cited to Circuit Court, and that case – *National Union Fire Ins. of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) – was cited in Defendants' *new trial motion*, filed after the Circuit Court had heard testimony and after he had entered a permanent injunction.

Accordingly, this Court should not address Defendants' argument that collateral estoppel is an issue that

should be resolved by the arbitrators. That argument has not been preserved for appellate review by this Court.

CONCLUSION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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